Athiseshan Singaram v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–57 OF 2010

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ABDUL MALIK ISHAK, AZHAR AND AZIAH ALI JJCA
5 SEPTEMBER 2011

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Criminal Law — Dangerous drugs — Trafficking — 20,689.5g of ketamine — Appeal against conviction and sentence — Dangerous drugs found in bag carried by appellant at — Appellant showing no reaction when bag was opened customs officer — Appellant later attempting to run away from customs officers — Whether knowledge of drugs could be inferred from appellant's conduct — Whether knowledge of drugs established — Whether appellant had custody and control of the drugs — Whether conviction for trafficking was safe — Dangerous Drugs Act 1952 ss 2, 37(d) & 39B(1)

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SP4, SP5 and SP7 were customs officers manning the scanning machine to scan baggage brought in by passengers at the Kuala Lumpur International Airport. The appellant had arrived on a flight from New Delhi via Singapore. SP4 scanned one of the two bags carried by the appellant and saw a dark object inside the bag. The bag was then opened and a package containing crystal powder wrapped in aluminium foil was found. SP4 then brought the appellant and the bag to the customs office because SP4 wanted to get his test kit to determine whether the crystal powder was drugs. While SP4 was looking for the test kit, the appellant ran off towards the exit gate. SP5 gave chase and caught the appellant about 40–50 meters away from the customs office. Further examination of the bag revealed more packages containing the crystal powder. Tests showed that the powder was ketamine. The appellant denied knowledge of the drugs and claimed that he travelled to Malaysia to deliver designer sarees on behalf of his employer in India. He claimed that the bag was packed with sarees in New Delhi by a man named Seenivashagan. According to the appellant, one Hameed was also on the same flight with him. The appellant said that he was not trying to escape when he ran towards the exit gate but he was trying to locate Hameed who according to the appellant had wrongly taken his bag. The appellant was charged with an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) for trafficking in 20,689.5g of ketamine. He was tried and convicted on the charge and sentenced to death. The appellant appealed against the conviction and sentence. Counsel for appellant contended that: (i) the learned judicial commissioner erred by concluding that the respondent had proved possession of the drugs independent of s 37(d) of the Act; and (ii) the learned judicial

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commissioner erred by deciding that the appellant was guilty of trafficking as defined under s 2 of the Act.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) When the appellant was asked to open the bag, his reaction was normal. This lack of reaction on the appellant's part was inconsistent with his assertion that he was carrying sarees only. A reasonable person who had expected to see sarees in his bag would have displayed some reaction of surprise or shock or incredulity upon discovering that there were no sarees in the bag as expected but unfamiliar items in the form of boxes. A reasonable person in the same circumstances would have immediately protested in whatever manner he could to disclaim ownership of these boxes. On the contrary although the appellant appeared 'normal' he subsequently tried to run away purportedly to locate Hameed (see para 17).

(2) The appellant had physical possession of the bag. His conduct of running away gave rise to an inference that he had knowledge of the drugs in the bag. It was for the appellant himself to explain and satisfy the court as to why he ran away. The explanation offered by the appellant was that he wanted to locate Hameed. Counsel for the defence contended that Hameed was Ameertheem whose name appeared on the flight manifest. Hameed was fictitious and the appellant's attempt to escape by running away towards the exit pointed to the only logical conclusion that the appellant had knowledge that he was carrying dangerous drugs (see para 20).

(3) The bag was carried by the appellant and he had physical possession of it. The appellant was in possession of the bag and the key to the bag's padlock at the time of his arrest (see para 21).

(4) The identity of the exhibits was well established. The appellant had the requisite knowledge that the bag contained dangerous drugs and that the appellant had mens rea possession of the drugs independent of the statutory presumption under s 37(d) of the Act. The appellant had custody and control of the drugs. There was ample evidence to enable the court to safely conclude that the appellant was guilty of trafficking in dangerous drugs under s 2 of the Act (see para 22).

[Bahasa Malaysia summary

SP4, SP5 dan SP7 adalah pegawai-pegawai kastam yang mengendalikan mesin imbasan untuk mengimbas bagasi yang dibawa masuk oleh penumpang di Lapangan Terbang Antarabangsa Kuala Lumpur. Perayu telah tiba dari penerbangan dari New Delhi melalui Singapura. SP4 mengimbas salah satu daripada kedua-dua beg yang dibawa oleh perayu dan ternampak objek gelap di dalam beg tersebut. Beg tersebut kemudian dibuka dan bungkusan yang

mengandungi serbuk kristal yang dibalut dengan kerajang aluminium ditemui. SP4 kemudian membawa perayu dan beg tersebut ke pejabat kastam kerana SP4 mahu mendapatkan kit ujian untuk menentukan sama ada serbuk kristal tersebut adalah dadah. Sedang SP4 mencari kit ujian, perayu berlari ke arah pintu keluar. SP5 mengejarnya dan menangkap perayu kira-kira 40–50 meter dari pejabat kastam. Pemeriksaan lanjut beg mendedahkan lebih banyak bungkusan yang mengandungi serbuk kristal. Ujian menunjukkan bahawa serbuk tersebut adalah ketamine. Perayu menafikan pengetahuan mengenai dadah-dadah tersebut dan mendakwa bahawa dia ke Malaysia untuk menghantar sari-sari bagi pihak majikannya di India. Beliau mendakwa bahawa beg tersebut penuh dengan sari-sari dari New Delhi oleh seorang yang bernama Seenivashagan. Menurut perayu, seorang yang bernama Hameed juga berada dalam penerbangan yang sama dengannya. Perayu mendakwa bahawa dia tidak cuba untuk melarikan diri apabila dia berlari ke arah pintu keluar tetapi dia cuba untuk mencari Hameed, yang menurutnya, telah tersilap mengambil begnya. Perayu telah dituduh dengan kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') dan boleh dihukum di bawah s 39B(2) bagi pengedaran 20,689.5g ketamin. Dia dibicarakan dan disabitkan atas pertuduhan dan dihukum mati. Perayu merayu terhadap sabitan dan hukuman. Peguam bagi perayu menghujahkan bahawa: (i) pesuruhjaya kehakiman yang bijaksana terkhilaf dengan memutuskan bahawa responden telah dibuktikan memiliki dadah bebas di bawah s 37(d) Akta; dan (ii) pesuruhjaya kehakiman yang bijaksana terkhilaf dengan memutuskan bahawa perayu melakukan pengedaran seperti yang ditakrifkan di bawah s 2 Akta.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Apabila perayu diminta untuk membuka beg tersebut, reaksinya adalah normal. Kekurangan reaksi di pihak perayu adalah tidak konsisten dengan dakwaan beliau bahawa dia hanya membawa sari-sari. Seseorang yang munasabah yang menjangka untuk melihat sari-sari di dalam beg akan menunjukkan reaksi terkejut atau terperanjat atau tidak percaya apabila mendapati bahawa di dalam beg tidak terdapat sari-sari sebagai barang yang dijangka tetapi yang tidak dikenali dalam bentuk kotak. Seseorang yang munasabah dalam hal keadaan yang sama akan segera membantah dalam apa jua cara yang dia boleh untuk menolak milikan kotak-kotak. Sebaliknya, walaupun perayu kelihatan 'biasa', dia kemudiannya cuba untuk melarikan diri, kononnya untuk mencari Hameed (lihat perenggan 17).

(2) Perayu telah memiliki beg secara fizikal. Tingkahlakunya melarikan diri telah membawa kepada kesimpulan bahawa dia mempunyai pengetahuan tentang dadah-dadah di dalam beg. Adalah bagi perayu sendiri untuk menerangkan dan memuaskan mahkamah tentang mengapa dia melarikan diri. Penjelasan yang diberikan oleh perayu adalah bahawa dia mahu mencari Hameed. Peguam bagi pihak

pembelaan menghujahkan bahawa Hameed adalah Ameertheem yang namanya muncul di penyata penerbangan. Hameed adalah rekaan dan percubaan perayu untuk melarikan diri dengan berlari ke arah jalan keluar menunjukkan satu-satunya kesimpulan yang logik adalah bahawa perayu mempunyai pengetahuan bahawa dia membawa dadah-dadah berbahaya (lihat perenggan 20).

(3) Beg tersebut dibawa oleh perayu dan dia mempunyai milikan fizikal terhadapnya. Perayu telah memiliki beg dan kunci kepada mangga beg ketika ditangkap (lihat perenggan 21).

(4) Identiti ekshibit-ekshibit telah diwujudkan. Perayu mempunyai pengetahuan yang diperlukan bahawa beg tersebut mengandungi dadah-dadah berbahaya dan perayu mempunyai mens rea milikan dadah yang bebas daripada anggapan statutori di bawah s 37(d) Akta. Perayu mempunyai jagaan dan kawalan dadah. Terdapat bukti yang mencukupi untuk membolehkan mahkamah menyimpulkan dengan selamat bahawa perayu bersalah mengedar dadah berbahaya di bawah s 2 Akta (lihat perenggan 22).]

Notes

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 191–274.

Cases referred to

Khairuddin bin Hassan v PP [2010] 6 MLJ 145; [2010] 7 CLJ 129; [2010] 1 LNS 633, FC (refd)

Mohd Zaiham bin Mislan v PP [2009] 6 MLJ 737, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37, 37(d), 39B(1)(a), (2),
Evidence Act 1950 s 8

Appeal from: Criminal Trial No 45–131 of 2008 (High Court, Shah Alam)

Rajpal Singh (Musfirah bt Mohd Tahir with him) (Rajpal, Firah & Vishnu) for the appellant.

Tengku Amir Zaki bin Tengku Abd Rahman (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Aziah Ali JCA:

[1] The appellant was charged before the High Court at Shah Alam with an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the same Act for trafficking in 20,689.5g of

ketamine. He was tried and convicted on the charge and sentenced to death. We heard his appeal against the conviction and sentence and by a unanimous decision we dismissed his appeal and affirmed the conviction and sentence imposed on him.

BACKGROUND FACTS

[2] On 26 July 2008 at about 3pm, SP4 customs officer Adam bin Zulkifli was manning the scanning machine to scan baggage brought in by passengers at the Kuala Lumpur International Airport. Also on duty together with SP4 were SP5 Muhammad Zaidmuddin Jobri and SP7 Mohd Jamalludin bin Yasin.

[3] The evidence shows that the appellant had arrived on a Singapore Airlines ('SIA') flight from New Delhi via Singapore. SP4 saw the appellant walked past the scanning machine carrying two bags ('exhs P16 and P17'). SP4 called the appellant to scan the bigger of the two bags ('exh P16') and SP4 saw a dark object inside the bag. The appellant was directed by SP7 to open the bag and when the bag was opened, SP4 and SP7 saw that the bag was packed with boxes with the word 'Rahman' written on them (see exh P4(4) at p 255 of appeal record). SP7 opened one of the boxes ('the Rahman boxes') and found a package wrapped in aluminium foil and in the package was crystal powder. SP4 then brought the appellant and the bag to the customs office because SP4 wanted to get his test kit to determine whether the crystal powder was drugs. The customs office is located about 10–15 meters from the location of the scanning machine. However when SP4 was looking for the test kit, the appellant ran off towards the exit and SP4 asked SP5 to run after the appellant. SP5 caught the appellant at gate five of the arrival hall which was approximately 40–50 meters away from the customs office. SP5 brought the appellant back to the customs office. SP4 then brought both the appellant and the two bags to his superior SP8 Ismail bin Rejab.

[4] SP8 examined the bag and opened all the 'Rahman boxes' and found that each box contained white powder in clear plastic and wrapped in aluminium foil. SP8 then marked the bag 'A' and put his initial and date. Similarly he marked each of the 'Rahman boxes' as 'A1' – 'A25' and put his initial and date on the boxes. SP8 also marked the aluminium foil 'A1(1)' – 'A1(25)'. SP8 also received from SP4 the appellant's passport ('exh P45'). SP8 carried out a physical inspection on the appellant and from the appellant's trouser pocket SP8 seized a wallet ('exh P52') and a key and padlock ('exhs P54A' and 'P54B'). There was also a baggage tag affixed to the bag exh P16 (see exhs P4(3), P4(4) and P15 at pp 255 and 300 of the appeal record).

[5] SP8 then contacted the narcotics division for assistance. Three customs officers Kwa and Eric (both called and identified) and SP9 Sylvester Choo Kim

Hoon arrived. SP9 said they arrived at about 4.20pm. SP8 then surrendered the appellant and the exhibits to SP10 Yahaya bin Embi, the investigating officer ('IO') who testified that he was informed by SP8 that tests carried out by Kwa showed that the drug was ketamine. Like SP8, SP10 also put his initials on all the exhibits including two boarding passes with the name 'Athiseshan SMR' ('exhs P12A' and 'P12B'), a baggage ticket in the appellant's name ('exh P13'), an excess baggage ticket ('exh P14') which showed that the appellant had paid INR2550 for five kilograms of excess baggage, a baggage tag affixed to the appellant's bag (exh P15) and the appellant's passport (exh P45).

[6] Two days after the appellant's arrest, his cautioned statement ('exh D60') was recorded. In gist the appellant denied knowledge of the drugs in the bag. According to him he was asked by one 'Farouk' to send silk sarees to Kuala Lumpur. He met Farouk at Chennai Airport where he was given 30,000 rupees and a ticket to New Delhi. At New Delhi Airport someone by the name of 'Sinivasen' picked him up and took him to a place about 10km from the airport. The appellant then gave to Sinivasen the money that Farouk had given him earlier and Sinivasen gave the appellant 15,000 rupees. The appellant said that Sinivasen then showed him a bag containing sarees. He then went to take a bath and when he was packing, Sinivasen took the bag to the taxi and both of them then went to the New Delhi Airport. At the airport Sinivasen gave him a flight ticket to Singapore and Kuala Lumpur. The appellant states that during the flight he saw one person he knows as 'Hameed' whom he had met when he was at Sinivasen's place. On arrival at the Kuala Lumpur International Airport the appellant states that when he wanted to collect his bag Hameed came and said that the bag belonged to him (Hameed) but the appellant said the baggage tag bore his name. He took the bag because his name is on the baggage tag. He said he told Hameed that his bag was of a different colour but Hameed said that the bag had been changed at New Delhi Airport. When he was asked to open the bag, he found the key in the bag's pocket and the key was used to open the bag.

[7] Both SP4 and SP5 in cross examination agreed with counsel for the appellant that the appellant does not understand nor could he communicate in *Bahasa Malaysia*. Both witnesses and SP7 disagreed with the suggestion by learned defence counsel that the appellant had informed them in English that the bag belonged to Hameed and that he had run away to look for Hameed. SP7 who directed the appellant in English and by hand signal to open the bag testified that the appellant appeared normal when he was asked to open the bag. When SP7 opened one of the 'Rahman boxes' and subsequently found a package wrapped in aluminum foil inside which was crystal powder, the appellant who was standing there showed no reaction. SP10 in cross examination testified that there was no passenger named 'Hameed' listed in the passenger manifest ('exh P11') but there was a passenger named 'Ameertheem'.

SP10 disagreed with learned defence counsel's suggestion that the appellant had told him that Hameed's real name is 'Ameertheem'. SP10 testified that from his investigation with SIA there was no possibility that the appellant's bag had been tagged wrongly. SP10 said that both the baggage ticket exh P13 and the baggage tag exh P15 bear the appellant's name. According to SP4, SIA's customer services assistant on duty at the material time, the baggage ticket would be given to the passenger for reference whilst the baggage tag would be affixed to the bag. Subsequently SP10 handed over the 25 'Rahman boxes' to the chemist SP6 Maimoonah bt Sulaiman who confirmed that the total weight of the drugs from the 25 boxes was 20,689.5g. SP6 testified that the result of her tests showed that the drug was ketamine, which is listed in the First Schedule to the Act. The learned judicial commissioner accepted the evidence of the chemist SP6 and found that the prosecution has proved that the drug is ketamine, a prohibited drug under s 2 and the First Schedule of the Act and the total net weight in the 25 plastic packets is 20,689.5g.

[8] After a maximum evaluation of the evidence the trial judge found that the prosecution has prima facie established that the appellant had mens rea possession of the drug independent of the presumption under s 37(d) of the Act, that the appellant had custody and control of the said drug and that the appellant was trafficking in dangerous drugs based on the following:

(a) tests conducted by SP6 the chemist showed that the drug in the 25 plastic packets recovered from the bag exh P16 is ketamine;

(b) prima facie the prosecution has proven that the drug is the prohibited drug ketamine under s 2 and the First Schedule of the Act;

(c) the net weight of the drug is 20,689.5g;

(d) SP4, SP5 and SP7 saw the appellant carrying the bag exh P16 at the airport;

(e) the bag exh P16 is the same bag in the photograph exh P4;

(f) a comparison between the bag exh P16 and the photograph exh P4 showed no colour discrepancy as contended by defence counsel;

(g) the bag exh P16 bear the markings made by both SP8 and SP10;

(h) the bag exh P16 is the same bag that was confiscated when the appellant was detained;

(i) the travel documents recovered from the appellant such as the boarding pass receipt exh P13, the boarding passes exh P12 (A&B), the baggage tag exh P15 attached to the bag all showed that the appellant is the owner of the bag;

(j) the above documents and exh P11 also showed that the appellant travelled via SIA flight SQ 407 from New Delhi to Singapore and on

flight SQ 108 from Singapore to Kuala Lumpur and therefore there is no issue that the appellant had flown out of New Delhi on a different airline;

(k) at the material time the bag exh P16 was locked;

(l) upon being ordered to open the bag, the appellant had opened the said bag himself with a key that was in his custody;

(m) SP8 found the key and padlock in the pocket of the appellant's pants;

(n) the appellant's act of running away and the discovery of the key and padlock from the appellant showed that the appellant had knowledge that he was carrying dangerous drugs;

(o) there is a nexus between the appellant's act in running away and the suspicion of drug trafficking at the time of his detention;

(p) the appellant had no cause to fear the worst if there was no guilt on his part;

(q) the appellant was not in passive possession or merely holding exh P16;

(r) the appellant was moving the drugs via air travel from New Delhi to Singapore and from Singapore to Kuala Lumpur which is an act that amounts to trafficking as defined by s 2 of the Act; and

(s) the contention by defence counsel that the person 'Ameertheem' whose name appears on the flight manifest exh P11 is 'Hameed' who is the actual owner of the bag is unfounded.

[9] Based on the reasons above the learned judicial commissioner found that the prosecution has prima facie proven the charge under s 39B of the Act against the appellant and the appellant was called to enter his defence. The evidence for the defence shows that the appellant had visited Taiwan, Sri Lanka and Singapore. He had visited Taiwan and Malaysia to deliver sarees. He had visited Malaysia six times prior to his arrest. A week prior to his arrest the appellant had visited Malaysia for one day.

[10] Briefly the appellant's case is that he travelled to Malaysia to deliver designer sarees on behalf of his employer in India, a textile company known as 'Kumaran Textiles & Babu Textiles'. But no evidence was produced in support of his contention that he was an employee of the said company. He said that he was instructed by his employer's assistant, Farouk to deliver designer sarees to Malaysia. He was supposed to deliver the sarees to a local company called 'Chennai Silk' in Klang which had ordered the sarees but no representative from the local company was called to testify on his behalf because according to the appellant one week after his arrest his employer died and the company closed down.

[11] The appellant states that his trip started from Chennai to Bombay and then to New Delhi. In Bombay he was given the bag packed with sarees by a person named 'Mamathu'. The appellant then flew to New Delhi where he met a man named 'Seenivashagan' who had packed the bag with sarees. According to the appellant when Seenivashagan packed the bag he had gone to the bathroom and when he returned the bag had been closed. He was told the number lock for the bag is '120'. According to the appellant the bag that he had checked in at New Delhi airport had a combination lock and not padlock and key. He said that Hameed is a friend of Seenivashagan. He first met Hameed in Bombay. Hameed was also on the same flight from New Delhi to Singapore and to Kuala Lumpur. At the Kuala Lumpur International Airport he collected the bag which bore his baggage tag from a trolley. He said he noticed that the bag had a padlock and key and not a combination lock. In his cautioned statement there is no mention of collecting the bag from the trolley or about the combination lock No '120'. It is the appellant's contention that the bag exh P16 was not the bag he had brought with him from New Delhi. He said he was not trying to escape when he ran towards the exit gate but he was trying to locate Hameed who according to the appellant had wrongly taken his bag.

[12] At the end of the defence case the learned judicial commissioner found that the appellant has not raised any reasonable doubt in the prosecution's case. The learned judicial commissioner found the appellant's testimony that he was instructed by his employer to travel to Malaysia to deliver sarees as implausible as the appellant was a mere driver in his company with only a level nine education and conversant only in Tamil. With regard to the bag exh P16, the learned judicial commissioner found that the said bag belonged to the appellant based on the fact that the baggage tag attached to the bag bore the appellant's name, flight number and boarding number and these information are similarly stated on the electronic flight ticket, baggage tag receipt and the boarding passes. The travel documents showed that the appellant had travelled from New Delhi to Kuala Lumpur only on SIA and no other airline. SP4 had testified that the bag was not wrongly tagged.

[13] Regarding the issue of 'Hameed' who the appellant contends is the actual owner of the bag exh P16, in his testimony the appellant said that he does not know Hameed's real name. Therefore the learned judicial commissioner questioned the basis upon which the defence counsel contended that 'Ameertheem' whose name appears on the flight manifest is actually Hameed. The learned judicial commissioner found that except for alleging that Hameed is the actual owner of the bag, the appellant has not given any details to assist the police to further investigate the veracity of his allegation. Therefore the learned judicial commissioner found that Hameed is a mere fiction.

[14] The learned judicial commissioner found that whatever allegedly

A transpired in India prior to the appellant's arrest are fictional and an afterthought. The learned judicial commissioner found no reasonable doubt that the appellant was in possession of the bag that contained the prohibited drug and the appellant was arrested while carrying the bag which amounts to trafficking under s 2 of the Act. Therefore the learned judicial commissioner B found that the prosecution has proved beyond reasonable doubt the charge against the appellant and the appellant was convicted and sentenced to death.

[15] Before us learned counsel for the appellant raised primarily two issues as C follows:

(a) that the learned judicial commissioner erred by concluding that the respondent has proved possession of the drugs independent of s 37(d) of the Act; and

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(b) that the learned judicial commissioner erred by deciding that the appellant is guilty of trafficking as defined under s 2 of the Act.

[16] Counsel submits that to establish possession, it must be shown that not E only was the appellant in physical possession of the drugs, but that he knew of the contents of the bag exh P16. It is submitted that the learned judicial commissioner erred in finding that the appellant knew the contents of the said bag because he had run away after his detention and because the appellant had the key to the padlock in his pants pocket. Counsel relied on the appellant's F lack of reaction at the time the drugs were discovered to support the contention that the appellant had no knowledge that the bag exh P16 contained dangerous drugs. It is submitted that the appellant did not seem panicked, frightened or shocked when SP7 discovered the drugs in the bag. As to the appellant's conduct of running away, counsel submits that the appellant had not tried to G run away at any time. The appellant has explained that he did not try to run but was trying to find Hameed, the actual owner of the bag. It is submitted that the judicial commissioner erred in finding that Hameed is an afterthought. It is submitted that the appellant had succeeded in justifying his conduct and cast a H doubt in the prosecution's case.

[17] We find from the evidence that SP7 said that when the appellant was asked to open the bag, his reaction was normal. In our considered opinion this lack of reaction on the appellant's part is inconsistent with his assertion that he I was carrying sarees only. We are of the view that a reasonable person who had expected to see sarees in his bag would have displayed some reaction of surprise or shock or incredulity upon discovering that there were no sarees in the bag as expected but unfamiliar items in the form of boxes. A reasonable person in the same circumstances would have immediately protested in whatever manner he

could to disclaim ownership of these boxes. On the contrary although the appellant appeared 'normal' he subsequently tried to run away purportedly to locate Hameed.

[18] In the case of *Khairuddin bin Hassan v Public Prosecutor* [2010] 6 MLJ 145; [2010] 7 CLJ 129; [2010] 1 LNS 633, Abdull Hamid Embong FCJ in his judgment said that the act of running away from the scene of an offence is certainly a relevant fact. His Lordship said:

> The conduct of one suspected of an offence is a relevant fact which may be considered and evaluated by the court in coming to a conclusion on whether the suspect perpetrated the offence. Section 8(2) of the Evidence Act 1950 states that:
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> (2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

[19] The learned judicial commissioner cited the case of *Mohd Zaiham bin Mislan v Public Prosecutor* [2009] 6 MLJ 737 where the facts in that case show that the appellant pleaded to SP8 not to take action against him and the appellant looked uneasy, scared and nervous when he was asked to open the car boot. Zulkefli Ahmad Makinuddin FCJ said the conduct of the appellant are relevant and admissible under s 8 of the Evidence Act. The appellant must therefore explain his conduct. The appellant failed to do so and therefore the inference to be drawn from the evidence was that the appellant knew what he was carrying and it can safely be concluded that the appellant had mens rea possession of the drugs independent of the statutory presumption under s 37(d) of the Act.

[20] In the present case the appellant herein had physical possession of the bag exh P16. His conduct of running away gives rise to an inference that he had knowledge of the drugs in the bag. It is for the appellant himself to explain and satisfy the court why he ran away. The explanation offered by the appellant is that he wanted to locate Hameed. Counsel for the defence contends that Hameed is Ameertheem whose name appeared on the flight manifest. The learned judicial commissioner found that the contention that Hameed is Ameertheem is baseless as such contention is inconsistent with the appellant's own testimony that he does not know Hameed's real name. We have perused the appellant's testimony and we find that the appellant has clearly stated that he does not know Hameed's real name. Further as we have noted earlier both SP4 and SP7 denied counsel's suggestion that the appellant had told them in English that the bag belonged to Hameed. The issue of Hameed was raised in the appellant's cautioned statement which was recorded two days after his

A arrest. In the circumstances there is doubt cast on the appellant's explanation for his conduct in running away. Hence the appellant's explanation was rejected by the learned judicial commissioner. Abdull Hamid Embong FCJ in *Khairuddin bin Hassan v Public Prosecutor* [2010] 6 MLJ 145 said:

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> The trial court, having had the advantage of seeing and hearing the appellant's explanation is the best forum for determining whether such an explanation is credible or believable.
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> It is trite that, a trial judge, with audio-visual advantage of the witnesses, is entitled to accept one version and reject a contradictory version of any evidence adduced at the trial. There was no allegation during cross-examination of the prosecution witnesses that the police had attempted to fix up the appellant, or that they had acted with malice against him or even that they had cooked up a story about the appellant running away.

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D On the evidence we find that the learned judicial commissioner has not erred in finding that Hameed is fictitious and that the appellant's attempt to escape by running away towards the exit points to the only logical conclusion that the appellant had knowledge that he was carrying dangerous drugs.

E **[21]** Counsel further submits that the prosecution has failed to prove that the appellant had the key to the bag. We find from the evidence that the bag was carried by the appellant and he had physical possession of it. Thus the only person who would have the key to the bag and who could produce the said key would be the appellant. There is evidence that the appellant retrieved the key from the bag. We find no evidence to suggest that the prosecution witnesses had attempted to fix up the appellant. In the circumstances the learned judicial commissioner has not erred in his finding that the appellant was in possession of the bag and the key to the bag's padlock at the time of his arrest.

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G **[22]** We find that the identity of the exhibits is well established. There is no doubt that the bag exh P16 and the exhibits sent to the chemist for examination and subsequently produced in court are the exhibits recovered from the appellant at the time of his arrest. On the evidence we find that the learned judicial commissioner has not erred in finding that the appellant had the requisite knowledge that the bag contained dangerous drugs and that the appellant had mens rea possession of the drugs independent of the statutory presumption under s 37(d) of the Act. The evidence shows that the appellant had custody and control of the drugs. On 25 July 2008 the appellant had checked-in the bag exh P16 at New Delhi Airport. The appellant's name appears on the baggage tag indicating that the appellant was the owner of the bag. The boarding pass receipt, the boarding passes and the baggage tag (exhs 'P13', 'P12' and 'P15' respectively) all carry the same serial No SQ580770. Therefore based on the evidence the appellant had flown only on SIA from New Delhi to Kuala Lumpur via Singapore. On 26 July 2008 the appellant was

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seen by SP4 and SP5 to have carried the bag exh P16. The said bag was in his possession at the time of arrest. Thus we find ample evidence to enable the court to safely conclude that the appellant is guilty of trafficking in dangerous drugs under s 2 of the Act. For the reasons stated we unanimously dismissed the appeal and affirmed the conviction and sentence.

Appeal dismissed and conviction and sentence affirmed.

Reported by Kanesh Sundrum